Supreme Court, U.S.
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No. 00-659

In The

Supreme Court of the United States

AFFILIATED FM INSURANCE CO.,

Petitioner,

v.

CHEMICAL BANK, EUROPEAN AMERICAN BANK, BANQUE PARIBAS, AMERICAN EXPRESS BANK LTD., NATWEST BANK N.A., RABOBANK NEDERLAND, ANDINA COFFEE, INC. and ANDINA TRADING CORP.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Second Circuit Court of Appeals violated petitioner's right to appeal, federal appellate procedure, due process and fundamental fairness when it did not specifically mention in its opinions every argument raised on appeal?

2. Whether the fact that the Second Circuit Court of Appeals specifically mentioned some but not all of the petitioner's arguments in its opinions conflicts with decisions of this Court or of other circuits?

RULE 29.6 STATEMENT

Respondent Chemical Bank, now known as The Chase Manhattan Bank, is a banking corporation organized and existing under the laws of the State of New York. The Chase Manhattan Bank is a subsidiary of The Chase Manhattan Corporation and The Chase Manhattan Corporation has issued shares to the public.

Respondent American Express Bank Ltd., formerly known as American Express International Banking Corporation, is a Connecticut corporation and is a wholly owned indirect subsidiary of American Express Company. American Express Company has issued shares to the public.

Respondent NatWest Bank, now known as Fleet National Bank, is a wholly owned subsidiary of FleetBoston Financial Corporation, which has issued shares to the public.

Respondent Banque Paribas, now known as BNP Paribas, has no corporate parents or subsidiaries which are publicly held. Although BNP Paribas is publicly traded abroad, there are no institutional holders or publicly held companies, in the United States or elsewhere, which possess a 10% or greater interest in its stock.

Respondent Cooperative Centrale Raiffeisen-Boorleenbank B.A., also known as Rabobank, has no corporate parents or subsidiaries which are publicly held. In addition, there are no institutional holders or publicly held companies, in the United States or elsewhere, which possess a 10% or greater interest in its stock.

RULE 29.6 STATEMENT – Continued

Respondents Andina Coffee, Inc. and Andina Trading Corp. are New York corporations. Neither Andina Coffee, Inc. nor Andina Trading Corp. has issued shares to the public.

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RESPONDENTS' BRIEF IN OPPOSITION

After ten years of pre-trial proceedings, this case was transferred to the Honorable Milton Pollack, Senior United States District Court Judge, who promptly held a four week trial and ruled that the losses incurred by the Respondents[1] as a result of the acceptance of fraudulent documents were covered under an insurance policy issued by Petitioner Affiliated FM Insurance Co. ("Affiliated" or Petitioner). Affiliated appealed this judgment to the United States Court of Appeals for the Second Circuit (the "Second Circuit"), raising numerous arguments, including the seven it now assumes were ignored. Initially, the Second Circuit reversed the trial court's decision. After Respondents petitioned for rehearing, the Second Circuit invited Affiliated to reply to the petition, which it did, again raising the points it now assumes were ignored. The Second Circuit vacated its prior decision, affirmed in part and vacated in part the original

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[1] The Respondents are: Chemical Bank (now known as The Chase Manhattan Bank) ("Chemical"), Banque Paribas (now known as BNP Banque Paribas) ("Paribas"), American Express Bank Ltd. (formerly known as American Express International Banking Corporation) ("Amex"), NatWest Bank N.A. (successor in interest to National Westminster Bank USA; now known as Fleet National Bank) ("NatWest"), Cooperative Centrale Raffeisenboerenleenbank B.A., New York Branch (also known as Rabobank Nederland) ("Rabobank"), (collectively Chemical, Amex, Paribas, NatWest and Rabobank, the "Banks"), and Andina Coffee, Inc. and its subsidiary Andina Trading Corp. (collectively, "Andina," and together with the Banks, the "Respondents"). In the proceedings below, European American Bank ("EAB") sued Affiliated. That lawsuit has now been dismissed and EAB is not seeking appellate review of the dismissal.

judgment and remanded to the district court to recalculate damages. Affiliated then petitioned for rehearing, again raising the seven arguments. Affiliated's petition was denied by the panel, and no active judge requested that a vote be taken to hear the case *en banc*.

Affiliated now comes before this Court seeking a writ of certiorari, claiming it was deprived of its procedural and Constitutional rights because not all of its arguments were specifically mentioned by the Second Circuit in its opinions. Affiliated, however, has failed to satisfy any of the tests set forth in Supreme Court Rule 10 or to offer any other compelling reason why this Court should exercise its discretion and review the decision of the Second Circuit. Respondents therefore respectfully submit that the petition should be denied.

STATEMENT OF THE CASE

A. The Relevant Facts

The Parties and their Commercial Dealings. Andina was an importer of Colombian coffee. Each of the Banks extended separate secured lines of credit to Andina to finance its purchases of coffee from Colombian exporters, including Gonchecol Ltda. ("Gonchecol"). Ruben Echeverri ("Echeverri") was a principal officer of Gonchecol.[2] Andina and the Banks had

[2] Echeverri held a minority interest in one of three Panamanian corporations, which in turn owned the stock of Andina. Other members of the Echeverri family and members of two other Colombian families, who were engaged in the coffee

always believed the Echeverris to be a leading Colombian family, well regarded in the political and business communities.

Between 1974 and 1986, the Banks and other financial institutions extended hundreds of millions of dollars of credit to Andina pursuant to letter of credit transactions of the type involved in this action. These obligations (other than the losses at issue here) were timely repaid.

Each letter of credit provided that the Colombian exporter, as beneficiary, could obtain payment from the Bank by presenting certain draw documents (the "Draw Documents"), including truck bills of lading ("TBOLs").[3] The TBOLs represented that the coffee existed, that the trucker had assumed responsibility for the transportation of the coffee and that the export cycle had commenced. Each Bank's letter of credit department independently serviced its own letter of credit transactions, determined whether the Draw Documents conformed to the letter of credit terms, and thereafter accepted the TBOLs and other Draw Documents and paid the Colombian exporter. Each letter of credit draw resulted in a reimbursement

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business, owned shares in the Panamanian corporate shareholders of Andina. Echeverri family members did not participate in the management of Andina's day-to-day operations and never constituted a majority of its board.

[3] For a more detailed description of the coffee exportation process, see Judge Pollack's description in footnote 18 of the findings of fact, appended to Affiliated's petition for a writ of certiorari ("Pet. App."). Pet. App. 34a-35a.

obligation on the part of Andina to the issuing Bank, which Andina would typically repay once it had sold the coffee.

The Affiliated Policy. As a condition of the extension of financing, each Bank required Andina to maintain suitable insurance covering Andina's interests and the interest of the Bank. To satisfy this requirement, Andina obtained from Affiliated an insurance policy dated July 23, 1980 (the "Policy" or the "Affiliated Policy"), which included fraudulent document coverage under a separate typewritten Special Condition (the Fraudulent Bill of Lading Clause or "FBOL Clause").[4] The Policy insured Andina and, pursuant to Clause 2 thereof, the interests of "whom it may concern," including the Banks. Each Bank was also named in the Policy as an additional insured in separate endorsements entitled "Special Terms and Conditions" (the "Bankers' Endorsements"). The Banks and Andina relied upon the Policy, including the FBOL Clause.

In mid-1985, Affiliated decided to discontinue various policies, including the Affiliated Policy, and contacted Andina's insurance broker, Trinder & Norwood ("T&N") to request that replacement coverage be obtained. A cancellation notice, dated November 27, 1985, was sent to T&N, but not to Andina or to any Bank. Because T&N preferred not to market the Andina account

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[4] The FBOL Clause states: "38. (D) This policy covers loss or damage occasioned through the acceptance by the Assured and/or their agents or shippers of fraudulent Bills of Lading and/or shipping receipts and/or messenger receipts and/or warehouse receipts and/or truckmen's receipts."

under a notice of cancellation, it asked Affiliated to rescind the notice, and Affiliated agreed. T&N then undertook to find a replacement policy as soon as possible. Respondents did not learn of these events until after this litigation commenced.

On February 25, 1986, T&N obtained from certain Lloyds syndicates and other companies in the London market (the "London Insurers") a cover-note for a new policy (the "London Policy") purportedly "effective with all shipments made on/or after February 25, 1986."

At Affiliated's request, on April 22, 1986, the London Insurers issued Endorsement No. 9 to the London Policy. The discussions among Affiliated, T&N, and the London Insurers with respect to Endorsement No. 9 are referred to by Affiliated as the "April Agreement." Affiliated asserted at trial that this endorsement shifted coverage for the Fraudulent Document Losses to the London Insurers. The district court and the Second Circuit rejected Affiliated's argument.

Discovery of the Fraud. In the Spring of 1986, Gonchecol faced a cash flow problem, which it advised Andina's Board of Directors was temporary and resolvable. Echeverri assured Andina's Board that Gonchecol would continue to fulfill all its commitments. In the summer of 1986, Andina noticed a marked elongation in the export cycle, and meetings were held with the Banks to discuss Gonchecol's cash flow problems.

In August 1986, officers from Andina and Amex separately traveled to Colombia to investigate delays in coffee shipments financed by the Banks. On August 14, 1986, representatives of the Banks and Andina met in New

York to discuss the delays. During the meeting, the Andina and Amex officers telephoned from Colombia and informed the group that approximately 200,000 bags of Bank-financed coffee could not be located. On August 19, 1986, at a meeting in Colombia with representatives of three of the Banks, Echeverri admitted that the TBOLs presented to the Banks between December 1985 and July 1986 were fraudulent in that the coffee described therein was not in the possession or control of either the trucker or port forwarder, but was "missing." The district court determined that no Respondent knew of or participated in the fraud.

As a result of the acceptance of the fraudulent TBOLs in New York and payment of the corresponding letters of credit, the Banks and Andina incurred losses (the "Fraudulent Document Losses") in the tota! principal amount of $94,598,368.

Bank representatives met and spoke with Affiliated representatives, requested forms of proofs of loss, offered to make Bank employees available for interviews and urged Affiliated to appoint a surveyor to investigate the losses. Affiliated rejected all these requests and offers. Respondents timely filed written proofs of loss with Affiliated. No Affiliated witness testified at trial that Respondents withheld or concealed any information or facts from Affiliated concerning their losses. Affiliated did not pay Respondents' claims and did not reject the claims until it filed its answers to the complaints.

In 1994, Echeverri was arrested in Miami, Florida, and in 1995 he pleaded guilty to two counts of bank fraud

for defrauding the Banks. *United States v. Echeverri*, 94 CR 92 (JFK) (S.D.N.Y. 1994).

B. Course of Proceedings

Beginning in January 1987, Respondents commenced separate actions against Affiliated and the London Insurers asserting claims under the Affiliated Policy and the London Policy for losses arising from the Banks' acceptance of fraudulent TBOLs. Because the London Insurers asserted that the London Policy was void *ab initio* by reason of alleged broker non-disclosures, Respondents also sued the brokers which obtained the London Policy. The federal actions were initially assigned to the late Senior District Judge Broderick (and a magistrate judge) and were consolidated for discovery and then for all purposes. In January 1993, Respondents' claims against the London Insurers and against the brokers were settled without determination as to whether the London Policy was validly issued.

The FBOL Decision. Affiliated's principal defense was that the Policy did not cover losses resulting from the acceptance of fraudulent TBOLs describing nonexistent coffee. The district court (Broderick, D.J.) held that the Policy "was not ambiguous" and that the FBOL Clause "provided coverage" for losses arising from the acceptance of fraudulent TBOLs "concerning what turned out to be nonexistent coffee shipments." *Chemical Bank v. Affiliated FM Ins. Co.*, 815 F. Supp. 115, 116 (S.D.N.Y. 1993) (the "FBOL Decision"). The district court also ruled that the Banks' losses were covered pursuant to the "of whom

it may concern" clause of the Policy, because the Banks had an insurable interest under the Policy.

The Innocent Coinsured Decision. In an effort to defeat coverage as to the Banks, Affiliated then alleged that Andina participated in the fraud. However, the district court (Broderick, D.J.) determined that under New York's innocent coinsured doctrine, Andina's purported wrongdoing was not a defense to the Banks' claims. *Chemical Bank v. Affiliated FM Ins. Co.*, No. 87 Civ. 1050, 1994 WL 31413 (S.D.N.Y. Jan. 25, 1994) (the "Innocent Coinsured Decision"). *See also Reed v. Federal Ins. Co.*, 71 N.Y.2d 581, 523 N.E.2d 480, 528 N.Y.S.2d 355 (1988).

Pre-Trial Discovery. The parties conducted extensive pre-trial discovery for nearly a decade during which hundreds of thousands of documents were produced, over 2,600 deposition exhibits were marked, and 74 witnesses were deposed for over 300 days. On April 26, 1994, the magistrate judge entered an order establishing a schedule for completion of discovery. An agreed amendment to that Order further directed that remaining depositions of trial witnesses be held in New York prior to trial.

Affiliated's amended list of 75 trial witnesses included Luis and Jorge Echeverri. The Banks sought to depose the Echeverris. Neither would appear in the United States for deposition or trial and therefore the magistrate judge, by Order dated December 13, 1994, precluded Luis and Jorge Echeverri from testifying at trial. Affiliated did not appeal the order, but nevertheless sought to add Luis and Jorge Echeverri to its witness list in October 1995. The district court ruled that Affiliated

could do so only if the Echeverris came to the United States to be deposed and testify, and precluded testimony by satellite transmission from Colombia. The district court further ordered that if they did not appear for deposition, they would not be permitted to testify at trial. Neither Luis nor Jorge Echeverri appeared in the United States for deposition or trial.

Affiliated's Pretrial Conduct. After the FBOL and Innocent Coinsured decisions, Affiliated focused its defense on its allegation that Andina *and* the Banks participated in the fraud. At trial, Judge Pollack found that "as part of its casting about for a defense strategy" and in its efforts to "concoct a defense to the Banks' claims":

> Affiliated engaged in secret, questionable negotiations to induce Ruben Echeverri and his brothers, Luis and Jorge Hernan, to impute to the Banks and Andina knowledge of and participation in the fraud. Affiliated's pretrial strategy . . . at a minimum casts doubt on the management's integrity in its attempt to find a cognizable defense.

Pet. App. 52a. Affiliated's attorneys acknowledged that they and other Affiliated representatives had extensive, clandestine contacts with the Echeverris in Colombia, Panama and Key Biscayne, Florida and prepared and obtained statements charging Respondents with knowledge of the fraud. At deposition, however, Echeverri testified that he repeatedly informed Affiliated that the Banks did *not* know of the fraud prior to mid-August 1986 and that he nevertheless was asked by Affiliated to sign statements to the contrary. Echeverri further testified

that Affiliated's representations persuaded him to provide false statements in order to obtain immunity from criminal prosecution in the United States.[5]

After obtaining the Echeverri statements, Affiliated's counsel destroyed verbatim stenographic transcripts of two meetings with Echeverri and his brothers.

C. The Trial

Following a four-week bench trial of these cases, on July 18, 1997, District Court Judge Pollack issued a detailed decision, which clearly and completely set forth its factual findings and conclusions of law. The trial included live testimony by twenty witnesses, including officers responsible for the Andina account at each Bank during 1985 and 1986, two employees of T&N, and Affiliated's underwriter, as well as Echeverri's six-day videotaped deposition. Documentary evidence, consisting of hundreds of trial exhibits and the deposition testimony of twenty-four additional witnesses, also was submitted. The parties further submitted bench memoranda marshalling evidence on certain key issues, pre-trial and post-trial proposed findings of fact and conclusions of law containing extensive citations to the record and case law, and statements in lieu of summation.

The district court resolved all of the legal and factual issues raised by Affiliated in favor of the Respondents.

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[5] Echeverri, who was subject to arrest in the United States, also testified that he was advised by Affiliated's counsel to remain in Colombia.

D. The Second Circuit's Decisions

Affiliated's appeal to the Second Circuit raised many arguments, including the seven points noted in the Petition. Pet. 6-8. In its original opinion, decided February 25, 1999, the Second Circuit acknowledged these points, but focused on the only issues that warranted attention, stating:

> Affiliated makes *several claims of error* on appeal, but the dispositive issue is whether the Banks are bound by T&N's cancellation and replacement of the Affiliated Policy on February 25, 1986, and by T&N's subsequent April Agreement allocating the respective liabilities under the Affiliated and London policies.

Pet. App. 17a-18a (emphasis added). The Second Circuit held that Respondents were bound by T&N's cancellation on February 25, 1986, because they effectively ratified the cancellation by their subsequent actions. Pet. App. 22a-25a. Furthermore, the Second Circuit held that because T&N had "apparent authority" to enter into the so-called April Agreement, Respondents were also bound by its allocation of liabilities. Pet. App. 26a-28a. Accordingly, it reversed the district court's judgment.

Respondents filed a petition for rehearing *inter alia* pointing out that the Second Circuit had overlooked certain provisions of the Affiliated Policy. Those provisions provided insurance coverage to the Respondents, notwithstanding the so-called April Agreement.

In opposition to Respondents' petition for rehearing, in addition to responding to these arguments, Affiliated again specifically set forth the seven arguments it now

says were ignored by the Second Circuit. None of these arguments has merit. These arguments were rejected by the district court for the following reasons:

1. *The Draw Documents.* The Draw Documents conformed to the Banks' letters of credit, the TBOLs were not "future-dated," and the dates on the TBOLs were included only for purposes of determining staleness.

2. *Awareness of Fraud.* The Draw Documents, delays in delivery, and Andina's request for additional time for repayment did not alert any of the Banks to the existence of fraud.

3. *Extent of FBOL Clause Coverage.* As determined in the FBOL Decision (and affirmed by District Court Judge Pollack after the trial), the Affiliated Policy was unambiguous and covered losses arising from nonexistent coffee shipments.

4. *Date of Loss.* The coffee did not exist when each fraudulent TBOL was accepted by the Banks, and the Banks' insured losses occurred at that time.

5. *Limitations on Liability.* Each acceptance of fraudulent bills of lading constituted a loss and no such acceptance exceeded the $8 million "any one place at any one time" limit. The limitations on accumulation of interests " . . . by reason of any interruption of transit . . . or by any reason of casualty" did not apply to the Fraudulent Document Losses because there was no interruption of transit and no casualty. Moreover, each Bank's aggregate claims were within the limitation amount.

6. *Duty of Good Faith.* Respondents acted in good faith and the maritime law concept of *uberrimae fidei* was not violated. Moreover, this precept of maritime law was not implicated because these land risks were governed by the substantive law of New York.

7. *Preclusion of Testimony by Satellite.* This was a discretionary decision made independently and pursuant to separate applications to the magistrate judge as well as two district court judges. The magistrate judge precluded Luis and Jorge Echeverri from appearing on Affiliated's witness list, and the district court barred their addition to the witness list unless they could be deposed by Respondents in the United States. The use of satellite depositions in Colombia, which violated Colombian law, was rejected. The district court also refused to admit into evidence Luis and Jorge Echeverris' self-serving, hearsay affirmations, and explicitly discredited Ruben Echeverri's videotaped testimony based upon the credible testimony of other witnesses and Affiliated's dealings with the Echeverris.

The panel reversed itself on November 8, 1999, candidly stating: "we failed to note, or at least perceive the implications of, the fact that the April Agreement did not even purport to narrow the coverage of the Affiliated Policy." Pet. App. 5a. Because Affiliated remained fully liable for losses incurred before the effective termination date of the Affiliated Policy, February 25, 1986, the Second Circuit vacated its original disposition, affirmed the judgment in favor of Andina, and remanded to the district court to recalculate each Bank's damages and enter a corresponding judgment.

On November 29, 1999, Affiliated sought rehearing and rehearing *en banc* on both the April Agreement issue and on the seven "ignored" arguments. On July 24, 2000, the Second Circuit denied rehearing. No judge even requested that a vote be taken for *en banc* review. Pet. App. 98a-99a. The Second Circuit promptly denied Affiliated's motion to stay the mandate pending a petition for certiorari to this Court. On August 17, 2000, Justice Ginsburg denied Affiliated's application for a stay of the Second Circuit's mandate pending a petition for certiorari to this Court.

SUMMARY OF ARGUMENT

Further review of this case is not warranted. Affiliated cites the proposition that an appellate court should decide all arguments which properly have been presented and which require resolution in order to dispose of the appeal. Affiliated then leaps to the conclusion that if there is not a specific mention of each argument, or a ritualistic declaration that all arguments are "without merit," the appellate court has failed to consider all arguments and has thereby deprived the appellant of its Constitutional right to due process and violated federal appellate procedure. No case supports this claim, nor does any principle of law or appellate practice, directly or by analogy, support inferring such a right or procedural

requirement. Affiliated has no basis for its assertion that the Second Circuit failed to consider its arguments.[6]

Respondents' arguments in opposition are threefold.

First, traditional appellate practice is consistent with – not contrary to – the Second Circuit's handling of this case. Moreover, the final judgment rule does not require that each of an appellant's arguments be separately, specifically mentioned.

Second, Affiliated's contention that a conflict exists between the Second Circuit's actions and other decisions is baseless. The cited authority stands for no more than the desirability of a higher court remand to allow a lower court to determine previously unaddressed issues which first become relevant because of the higher court's ruling.

Third, Affiliated's arguments that its right to appeal, accepted federal appellate procedure, due process, and fundamental fairness have been violated were never fairly presented to the Second Circuit. The questions presented thus should not be considered.

Affiliated has failed to present any "compelling reason" of the type enumerated in Supreme Court Rule 10 which would warrant the granting of its petition for a writ of certiorari. This petition should be denied.

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[6] Affiliated devotes a substantial portion of its petition to attempting to show that there is some shred of merit to its seven arguments. Pet. at 12-15. Whether any support for its positions exists is irrelevant to this petition, however, because the Second Circuit decided the appeal fully. Affiliated is not seeking review of the merits of any of these arguments.

REASONS FOR DENYING THE WRIT

1. The Second Circuit's decision is in accord with traditional appellate practice and does not implicate the final judgment rule.

a. Traditional appellate practice frequently entails the resolution of issues without opinions or writings on the merits.

Despite Affiliated's protestations, the Second Circuit fully decided its appeal. The judgment was vacated and remanded to the district court for recalculation of the damages in accordance with the Second Circuit's decision. In so doing, the Second Circuit necessarily decided all of the issues raised by Affiliated. Traditional appellate practice does not require mention of all arguments an appellant has made. In fact, Affiliated's assertion that the Second Circuit did not even consider its argument is pure speculation and contrary to the general presumption that no official or person acting under an oath of office acts contrary to his or her official duty, or omits anything which his or her official duty requires to be done. *See Strickler v. Greene*, 527 U.S. 263, 286 (1999) (presumption that official acts are properly discharged); *United States v. Chemical Found.*, 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.").

First, citing no authority, Affiliated asserts that courts of appeals have a duty to state that an appellant's arguments not specifically discussed are "without merit."

Affiliated admits, however, that appellate courts frequently focus on one or two issues without writing opinions explaining their rejection of other points. Pet. at 12, 16. Indeed, it is accepted appellate practice that an appellant does not have a right to a written opinion on every point raised. *See United States v. Garza*, 165 F.3d 312, 314 (5th Cir.) (holding that a "litigant's right to have all issues fully considered and ruled on by the appellate court does not equate to a right to a full written opinion on every issue raised"), *cert. denied*, 120 S. Ct. 502 (1999); *Mainiero v. Jordan*, 105 F.3d 361, 365 (7th Cir. 1997) (" 'procedural fairness does not require an appellate court to discuss every issue raised by an appellant' ") (*quoting Kairys v. I.N.S.*, 981 F.2d 937, 940 (7th Cir. 1992)); *Furman v. United States*, 720 F.2d 263, 264-66 (2d Cir. 1983). Similarly, where a court of appeals notes that "[a]ppellants raise a number of claims, only two of which require discussion," *United States v. Jones*, 763 F.2d 518, 520 (2d Cir. 1985), a district court will reject collateral challenges to the unmentioned arguments. *See Jones v. United States*, No. 88 Civ. 3999 (MJL), 1990 WL 6566, at *3 and n.6 (S.D.N.Y. Jan. 24, 1990), *aff'd*, 918 F.2d 9 (2d Cir. 1990) ("Yet by its preliminary remarks, we may presume that [the court of appeals] considered those claims so lacking in merit as to be unworthy of discussion.").

In fact, the duly adopted rules of procedure and this Court have repeatedly affirmed that courts of appeals have wide discretion to decide whether and how to write their own opinions. *See* Fed. R. App. P. 36; S. Ct. R. 18.12; 2d Cir. R. § 0.23 (permitting summary disposition of appeals); *Taylor v. McKeithen*, 407 U.S. 191, 194 n.4 (1972) (acknowledging that the courts of appeals have "wide

latitude in their decisions of whether and how to write opinions"); *Sumner v. Mata*, 449 U.S. 539, 548-49 (1981) (stating that a court need not elaborate or give reasons for rejecting claims which it regards as frivolous or totally without merit); *Lego v. Twomey*, 404 U.S. 477, 482 n.6 (1972) (reviewing court of appeals' summary affirmance without comment on its summary nature); *see also Coleman v. Thompson*, 501 U.S. 722 (1991); *Harris v. Rivera*, 454 U.S. 339, 344 (1981).

Whether an appellate court simply affirms without opinion, affirms on the opinion below, or mentions only the significant issues, the result is the same – the arguments raised by the losing party have been rejected. Affiliated seeks not to enforce traditional appellate practice but to create a new rule, the magnitude of which would significantly change state and federal appellate practice. Were the courts of appeals' time unlimited, their opinions could discuss every argument, no matter how trivial, raised by appellants. Courts' time is not boundless, however, and such an exercise would not comport with traditional appellate practice.

Second, Affiliated seeks support in the rules of preclusion, arguing that when a court of appeals "affirms on one ground and disregards the other[s] . . . .", the issues which are not specifically mentioned may be relitigated. Pet. at 16, *quoting Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 45 (2d Cir. 1986). Affiliated's argument is irrelevant and turns on its head its own contention that it has been deprived of its rights by the Second Circuit. If Affiliated retains the right to reargue these unmentioned points in collateral proceedings, then it has not been deprived of any rights.

It is apparent that traditional appellate practice contradicts, not supports, Affiliated's position.

b. The Second Circuit fully exercised its jurisdiction after the district court entered a final judgment.

Affiliated notes that federal law permits a party but one appeal, after a final judgment. According to Affiliated, the courts of appeals are thus required to analyze separately and specifically the merits of each and every argument raised in that final appeal. Affiliated claims that without such individualized treatment of each and every issue, arguments not specifically discussed must be deemed to have "fall[en] between the cracks," contrary to a never-articulated legislative intent behind the final judgment rule.

This case actually illustrates why such a rule does not, and should not, exist. Affiliated squarely presented its seven arguments in (i) its appellant's brief, (ii) its opposition to Respondents' petition for rehearing, and (iii) its own petition for rehearing. These meritless, thrice-repeated arguments did not fall between the cracks, and the decision below did not expose some latent risk in the final judgment rule.

The decisions of the Second Circuit are the product of an appellate court properly using its resources. The court analyzed the issues presented, and without wasting resources on meritless arguments that required no written analysis, discussed those arguments it deemed worthwhile to explore at length. *See Taylor*, 407 U.S. at 194 n.4; *Sumner*, 449 U.S. at 548-49; *Garza*, 165 F.3d at 314 ("Even

though this Court did not expressly discuss [an issue], the issue nonetheless received fair consideration and a ruling."); *Mainiero*, 105 F.3d at 365 (" 'An appellate court is not a performing bear, required to dance each and every tune played on an appeal . . . . Any of the . . . issues raised and not discussed . . . can be deemed to lack sufficient merit or importance to warrant individual attention' ") (*quoting State v. Waste Management of Wis., Inc.*, 261 N.W.2d 147, 151 (Wis. 1978)); *United States v. Patel*, 879 F.2d 292, 295 (7th Cir. 1989); *Furman*, 720 F.2d at 264-66; *Jones v. United States*, 1990 WL 6566, at *3 (court would not presume that undiscussed issues had been disregarded).

The Second Circuit fully exercised the jurisdiction granted it by Congress. In fact, the Second Circuit heard Affiliated's seven arguments multiple times, and resolved them. Just as in many other cases that are partly or completely summarily decided, Affiliated has had a full and fair opportunity to present its arguments and those arguments have been rejected by the Second Circuit. Affiliated was not denied any rights.

2. No conflict exists between the proceedings below and other caselaw.

a. No conflict exists between the proceedings below and this Court's "teachings."

Affiliated notes that when an issue has not been ruled upon, this Court will often remand the case to allow the lower court to consider the previously unaddressed issues. The cases cited by Affiliated, however,

merely involve situations where this Court remanded to permit the courts below to consider unaddressed issues revived by the Court's reversal of the decision below.

First, in both *United States v. United Continental Tuna Corp.*, 425 U.S. 164 (1976), and *Wood v. Strickland*, 420 U.S. 308 (1975), this Court granted certiorari and reversed the lower court's decision on substantive issues. The Court then remanded to give the court of appeals an opportunity to rule upon other issues raised by the respondents that had not been decided precisely because of the lower court's prior rulings. In the present case, Affiliated does not seek reversal on substantive grounds, but only a remand so that it can reargue the seven points specifically rejected by the district court and already argued no less than three times to the Second Circuit. The Second Circuit had ample opportunity to consider Affiliated's positions, and plainly resolved them against Affiliated. No conflict exists between the Second Circuit's decision and the procedures followed in these cases.

Second, in both of the double jeopardy cases cited by Affiliated, this Court reversed the court below on a *substantive* issue. Recognizing that other substantive issues quite properly had not been considered in the first instance by the appellate or trial court below, this Court followed its usual procedure and remanded for further determination. *Benton v. Maryland*, 395 U.S. 784 (1969); *United States v. Wilson*, 420 U.S. 332 (1975). For example, in *Wilson*, a criminal defendant made a number of post-verdict motions and won a dismissal of the indictment on a *Marion* delay claim. 420 U.S. at 333, 353. The court of appeals held that the government could not appeal from

such a decision, and therefore the court could not consider the substance of the appeal. This Court reversed, finding that such appeals were permissible. *Id.* at 339, 352-53. The Court therefore remanded the entire case to the court of appeals to make the initial substantive review. *Id.* at 353. Similarly, this Court in *Benton* reversed a larceny conviction on double jeopardy grounds, and remanded to permit a state court to analyze, in the first instance, the relationship under state law between the larceny and burglary charges. 395 U.S. at 797. In contrast, here all of Affiliated's arguments were ruled upon and rejected by the Second Circuit in its remand to the district court for entry of a modified judgment.

Third, Affiliated argues that *N.L.R.B. v. Deena Artware, Inc.*, 361 U.S. 398 (1960), supports its position. In fact, this Court granted certiorari in *Deena Artware* on the issue of whether discovery should be ordered to permit inquiry into the second of two theories proposed by the National Labor Relations Board ("Board") – whether the defendants were a "single enterprise" – which the Board could not present fully because of the lack of discovery. 361 U.S. at 401-02. The issue was not that the court of appeals failed to mention the alternative theory, but whether the Board should have had the opportunity to present its claim fully in the first instance. Unlike *Deena Artware*, Affiliated does not argue that it was thwarted by the Second Circuit from fully and fairly briefing any issues.

There is simply no support in the governing caselaw that gives a litigant a due process or any other right to a written opinion on each and every issue it raises. None of these cases stands for such a proposition. Because none of

this Court's prior holdings suggests such a rule, review by this Court is unwarranted.

b. No conflict exists between the proceedings below and other courts of appeal.

Affiliated also attempts to create a conflict between the decision below and two decisions of other courts of appeal. However, these so-called conflicts are illusory.

In one instance, in an appeal of a denial of *habeas corpus* relief in a death penalty case, the Eleventh Circuit panel deliberately did not address a sentencing-phase ineffective assistance of counsel argument because to do so would have been inconsistent with the determination that a new sentencing phase was required. *Tucker v. Francis*, 723 F.2d 1504, 1516 (11th Cir. 1984), *vacated on rehearing en banc, Tucker v. Kemp*, 762 F.2d 1496, 1499-1500 (11th Cir. 1985). When the court *en banc* reversed the panel on the sentencing relief, it chose to remand the deliberately undecided issues for initial consideration by the panel. *Tucker v. Kemp*, 762 F.2d at 1509-10. In the instant case, however, the panel, upon rehearing, did not avoid addressing the seven arguments, deliberately or otherwise. In fact, the panel ruled against all of Affiliated's arguments by remanding the case for recalculation of damages. No conflict therefore exists between the decision below and the Eleventh Circuit's treatment of a death penalty *habeas* appeal.

Affiliated also claims that a conflict exists between the decision below and the Federal Circuit's procedural decision to reinstate an appeal that it had erroneously dismissed as not final. *See W.L. Gore & Assocs., Inc. v.*

International Med. Prosthetics Research Assocs., Inc., 975 F.2d 858 (Fed. Cir. 1992). *W.L. Gore* stands for the unsurprising proposition that if a court on reconsideration decides that it does have jurisdiction to hear an appeal, all motions pending when the appeal was dismissed are reinstated. *See* 975 F.2d at 860, n.1. *W.L. Gore* does not state, however, as Affiliated mistakenly suggests, that a court of appeals is required to state explicitly its reasoning – as opposed to issuing a summary decision – when it does consider the reinstated motion.

Because there is no conflict between the circuits on this issue, review by this Court is not warranted.

3. Affiliated failed to present fairly to the Second Circuit the Constitutional and procedural appellate practice issues raised in this petition.

Affiliated frames the questions presented as raising issues of Constitutional due process and fundamental fairness, statutory rights to appeal, and procedural appellate practice. Affiliated repeatedly admits that, after the initial panel decision, it twice drew the Second Circuit's attention to the other seven issues that it felt remained undecided. See Pet. at 9 and 11, n.6. Affiliated, however, failed to present fairly to the Second Circuit its contention that the failure specifically to mention each and every issue constituted a violation of its Constitutional and statutory rights and procedural appellate practice. In fact, the whole of Affiliated's argument at all stages in the proceedings below only touched on the rights it says were violated in two passing references in its Petition for Rehearing or Rehearing *en banc*. Resp. App. at App. 6, 7.

There is not a single citation in support of or discussion of the issues raised in this petition.

Such a passing reference did not fairly present the issue to the Second Circuit, and this Court should not grant *certiorari* on an issue that was never fairly raised below. *See Auer v. Robbins*, 519 U.S. 452, 464 (1997) (argument inadequately preserved in prior proceeding not considered on *certiorari* review); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *see also, Adams v. Robertson*, 520 U.S. 83 (1997) (dismissing certiorari as improvidently granted for failure properly to present federal question presented to state court below). Accordingly, Respondents object pursuant to Supreme Court Rule 15.2 to consideration of the questions presented because the issues they set forth were not fairly presented below.

CONCLUSION

Affiliated's petition fails to make the requisite compelling showing pursuant to Supreme Court Rule 10 for a writ of certiorari. The practice of the Second Circuit in this and in other cases, *i.e*, providing a written opinion mentioning some of the claims raised by the litigants without specifically mentioning others, is entirely consistent with the normal practice of this Court, other federal courts of appeals, and the courts of the several States.

Accordingly, Affiliated's petition for a writ of certiorari should be denied.

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App. 1

97-7982

United States Court of Appeals
for the
Second Circuit

CHEMICAL BANK, EUROPEAN AMERICAN BANK, BANQUE PARIBAS, AMERICAN EXPRESS BANK LTD., NATWEST BANK NATIONAL ASSOCIATION and RABOBANK NEDERLAND,

Plaintiffs-Appellees

– against –

AFFILIATED FM INSURANCE CO.,

Defendant-Appellant,

ANDINA COFFEE, INC. and ANDINA TRADING CORP.,

Consolidated Plaintiffs-Appellees.

(For continuation of Caption See Next Page)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

AFFILIATED AM INSURANCE CO.'S PETITION FOR REHEARING AND/OR FOR REHEARING EN BANC

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Defendants.

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B. The panel's November 8, 1999 decision on rehearing

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D. Covers, tables of contents, and selected pages from Affiliated's main brief (pp. 2, 15, 32-65) and reply brief (pp. 6, 25) and the American Insurance Association's amicus brief (pp. 1-7, 12-19, 29-34), relevant to the issues not yet decided

* * *

Some of these substantial issues provide a complete defense to plaintiffs' claims: others, only a partial defense. In any event, they cannot in fairness, as a matter of due process, and consistent with sound appellate court procedure, be allowed to slip through the cracks undecided just because the panel originally concluded, correctly we think, that this appeal could be disposed of on the basis of the December agreement canceling Affiliated's coverage as of February 25 and the April agreement replacing Affiliated with the London insurers on pre-February 25 interior risk.

If the panel does not grant rehearing and reinstate the original decision, nor decide the other substantial issues raised on this appeal, Affiliated suggests en banc consideration. We set out below the reasons why at least several of these undecided issues are themselves of exceptional importance, and why any appellate procedure which would allow such substantial issues to go undecided is of exceptional importance requiring en banc review.

* * *

Points Overlooked or Misapprehended by the Panel as to the Undecided Issues

Simple fairness, due process, and sound appellate practice require decision on the other substantial issues raised on this appeal. None were addressed in the panel's original or November 8 decisions. Affiliated sought to remind the panel that these issues must necessarily be decided if rehearing were granted, but did so only in a

long footnote in its Opposition to Rehearing (Page 19, n.18) We acknowledge our mistake in so relegating this reminder to a footnote.

Rather than attempt to rehearse all those issues here, we include in Addendum D the relevant portions of our main and reply briefs and of the American Insurance Association's amicus brief addressing these issues. These demonstrate that the undecided issues are substantial, raise complete or partial defenses, are fully briefed, and that it would be exceedingly unfair, a violation of due process, and a departure from sound appellate procedure to authorize a judgment for more than $50 million without deciding them on the merits. For illustrative purposes only we use the space available briefly to describe just two of the seven undecided issues.

* * *

Conclusion

For the reasons stated, Affiliated requests that the panel reconsider its November 8 ruling on the scope and effect of the April agreement, and reinstate its original ruling on that issue. If the panel declines to grant that relief, Affiliated requests that it decide the other undecided issues, restoring them to the argument calendar if that is deemed useful. Absent such relief,

Affiliated suggests en banc consideration in light of the importance of the substantive and procedural issues.

November 29, 1999

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